Filed 6/18/13 P. v. Crawford CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOHNNIE BERNARD CRAWFORD, Defendant and Appellant.	B238023 (Los Angeles County Super. Ct. No. SA075521)

APPEAL from a judgment of the Superior Court of Los Angeles County. Elden S. Fox, Judge. Affirmed as modified.

Alan S. Yockelson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, James William Bilderback II, and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

In an information filed by the Los Angeles District Attorney, defendant and appellant Johnnie Bernard Crawford was charged with second degree commercial burglary (count I; Pen. Code, § 459),[1] and vandalism over $400 (count II; § 594, subd. (a)). As to both counts, it was alleged that appellant's sentence could be enhanced pursuant to section 667.5, subdivision (b). Appellant pleaded not guilty and denied the allegations.

Trial was by jury. The jury found appellant guilty on both counts as charged. He admitted five prior conviction allegations.

Probation was denied. Appellant was sentenced to state prison for five years. He received presentence custody credit for 424 days of actual custody, plus 424 days of conduct credit, for a total credit of 848 days. The trial court ordered him to pay a $800 restitution fine pursuant to section 1202.4, subdivision (b), $80 in court security fees pursuant to section 1465.8, and $60 in criminal conviction assessments pursuant to Government Code section 70373. The trial court awarded $1,752.95 in direct restitution to the victim. It imposed and stayed a $800 parole revocation fine pursuant to section 1202.45.

Appellant timely filed a notice of appeal. On appeal, appellant argues: (1) Insufficient evidence supports appellant's conviction because (a) the courtyard does not constitute a building for purposes of the burglary statute (§ 459), and (b) even if the courtyard is a building, there was insufficient evidence of entry for purposes of burglary; (2) The trial court abused its discretion and denied appellant his right to due process and a fair trial by admitting, under Evidence Code section 1101, subdivision (b), testimony regarding two prior burglaries to prove intent; and (3) The trial court erred in failing to stay the sentence on appellant's vandalism conviction when he had been sentenced for commercial burglary.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

We agree with the parties that appellant's punishment on count II (vandalism) should have been stayed pursuant to section 654 because it was part of the same course of conduct and had the same objective as the burglary in count I. Therefore, we correct the sentence. Upon remand, we direct the trial court to modify the abstract of judgment to stay the sentence as to count II. In all other respects, the judgment is affirmed.

FACTUAL BACKGROUND

Prosecution Evidence

A. Current Burglary

In September 2010, David Knowlton (Knowlton) lived in a residence at 9004 Rosewood, in West Hollywood, which sat behind a small business compound located at 9009 Beverly Boulevard. The commercial building was two stories high and housed four businesses, including a hair studio, an art supplies store and studio, and an antique store. A 15-foot wall was attached to the building and surrounded the compound, with a locked eight-foot gate at the front and in the back of the compound. The businesses shared a patio/courtyard.

On September 25, 2010, at around 3:00 a.m., Knowlton woke up to the sound of repeated banging on what he thought was a dumpster. Fifteen to 20 minutes later, he heard a "creaking" sound like nails being pulled from wood. He looked out his window and down the driveway, but he did not see anyone. He continued to hear banging and the sound of plaster being hit with something heavy.

Suddenly, Knowlton saw a man wearing a Fedora hat and dark clothes walk "briskly" by the window. Knowlton continued to hear the banging sound, so he called 911. The banging continued until sheriff deputies arrived.

When Knowlton heard the deputies' voices, he saw one man run down the driveway away from the deputies. The other man, with the Fedora, ran "into the arms of the police."

Los Angeles County Sheriff Deputies Michael Egan and Kevin Tiwari responded to a dispatch of a possible burglary in progress at 9009 Beverly Boulevard. They received information that two men were trying to break in at the back of the location.

They saw appellant walking in their direction, wearing dark clothing. Appellant dropped a "bundle of items" on the ground. He was sweating profusely and breathing heavily.

Deputy Egan asked appellant where he was coming from. He replied, "The door was open and I was just checking the lock." Appellant was handcuffed and placed in a patrol car. Deputy Egan retrieved the items that appellant had dropped on the ground. He found a pair of dark gloves, a hat, and a dark shirt. The deputies drove around looking for the second suspect, but did not find anyone.

Deputies Christopher Bromiley and Randall Slate responded to the scene to assist in perimeter containment. They found a crowbar in a patch of ivy or shrubbery near the driveway. They observed extensive damage to a metal gate at the back of the compound. Deputy Slate found a deadbolt lock on the ground, inside of the compound. There were stucco and concrete pieces on the ground. Deputy Slate also saw a 24-inch metal plate that had been pried off the wall and placed against a planter 10 feet away. Both deputies noticed that appellant had stucco dust on his shoes.

A deputy took Knowlton for an in-field show up. Knowlton said that appellant looked "quite a bit" like the burglar, with the same general build and "lighter dark skin."

While appellant was being booked, Deputy Bromiley found a car key in appellant's possession. The deputy returned to the scene and found a Jeep Chrysler parked nearby. Appellant was the registered owner. While performing an inventory search of the vehicle, Deputy Bromiley found a bag containing tools in the cargo area, including a hacksaw with an additional blade and a screwdriver.

The building owner made over $1,700 in repairs to the building, gate, and lock.

B. Prior Burglaries

1. *1998 Burglary*

On June 17, 1998, Beverly Hills Police Officers Charles Yang and Jeffrey Gelfman responded to a burglary alarm at a commercial building located at 8820 Wilshire Boulevard in Beverly Hills. They went to the rear of the building, off an alley, and found that the "push bars" on the lobby door had been pried and broken. The lobby

provided access to most of the offices in the building, including Farsh International, a rug retail business.

The officers found a two-by-three foot hole in the drywall at the base of the wall, by the rug business. The officers also noticed some car keys and a Ralph's Club card near the base of the hole. They called for backup.

Officer George Elwell also responded to the scene and observed the damage to the rear lobby doors. He noticed some pry marks on a storage room door, right off the lobby. Inside the room, someone had attempted to tunnel into the next room, but abandoned the project after hitting concrete and large wooden studs.

Officer Elwell obtained information based on the Ralph's Club card left at the scene and obtained a search warrant for appellant's apartment and vehicle. Inside the apartment, officers found a matching Ralph's Club card on the coffee table in the living room. Officers also found a credit card in appellant's name. On a balcony inside the apartment, officers found two oriental rugs and an encyclopedia of antiques and rugs. Officers found a large crowbar in the trunk of appellant's vehicle, along with drywall plaster dust and a hammer, also covered in plaster dust.

2. *1993 Burglary*

On August 16, 1993, at around 1:00 a.m., Los Angeles Police Officers Michael Rossello and Robert Humphries responded to a burglary alarm at a strip mall at 19319 Ventura Boulevard in Los Angeles. They parked in a back alley and took a walkway to the front of the businesses, which contained, inter alia, a tobacco shop and a computer store. The first business next to the walkway was vacant, but officers could see that the door had been pried open. By looking in the windows, they could see appellant exiting a tunnel from the tobacco shop next door to the vacant store.

Appellant ran through the front door, past the officers, towards the parking lot. The officers yelled for him to stop, but appellant threw a four-foot crowbar at them, which landed at Officer Rossello's feet. Officer Rossello pursued appellant on foot, while Officer Humphries returned to the patrol car. Appellant ran down an embankment and tried to hide. Officer Rossello ordered appellant to stop and fired a warning shot into

the ground. Appellant surrendered. He was sweaty, breathing heavily, and had drywall residue on his clothes and in his hair. The officers retrieved the crowbar, a pair of gloves, and a walkie-talkie from the embankment where appellant was arrested. Officers also discovered that not only had appellant tunneled from the vacant store to the tobacco shop, but he had also tunneled from the tobacco shop to the computer store next door.

Defense Evidence

Los Angeles Sheriff Deputy Gregory Taylor brought the clothes appellant was wearing the night of the instant robbery to court. At that time, there was no white dust on those clothes.

DISCUSSION

I. *Appellant's conviction is affirmed*

Appellant argues that the judgment of burglary must be reversed because (1) the area appellant attempted to enter does not constitute a "building" for purposes of the burglary statute (§ 459); and (2) there was insufficient evidence of entry.

A. Proceedings below

At the close of the prosecutor's case-in-chief, defense counsel made a motion under section 1118.1 to dismiss the charges. Counsel argued that the structure was not a "building" because it had no roof over the courtyard. Furthermore, even if the structure was a building, there was no evidence that appellant made entry onto the premises. In response, the prosecutor argued that the structure containing the four businesses was attached by four walls and a roof and was designed to contain people or shelter property. It did not matter whether the courtyard was covered.

The trial court denied defense counsel's motion, reasoning: "There is clearly an issue that was raised by counsel because there is an open courtyard, apparently, inside the security gate; however, all of the other structures in or around apparently do contain the common law description of four walls and a roof, and from my review of case law which goes back at least to 1963, it appears that the common law descriptive purpose of the curtilage and/or the area immediately within even for commercial burglary qualifies when it is accessed in an area that would not otherwise be open to the public, for

instance, a porch or some other area which anyone could access to gain entry into what was described as a courtyard or the interior of this particular commercial building would require either someone to, apparently, climb a roof and then jump down an area which was described as probably 12 to 14 feet and/or attempt access through a security gate as described and shown with a very small space at the top in which a person would not be able to squeeze through, therefore requiring someone to either unlawfully break, damage or alter that condition and/or as described climb onto the roof and then jump down into the area.

"The Court believes that at least the factual description and the evidence as presented does warrant the trier of fact having the opportunity to make that determination, and as a matter of law the court does not deem the structure to be one which could not be burglarized unless the interior businesses were also either broken into or entered."

Regarding entry, the trial court also found that this was an issue for the jury to decide. The trial court stated: "Well, it's her testimony that none of the interior businesses were damaged; however, it's clear the gate was broken. The lock was apparently removed and lying inside of the area where the security gate would be.

"You know, the issue in this case in the Court's mind is the issue of intent. Why would the person, assuming it's your client, based on the evidence in this matter[,] want to remove a gate and remove a lock other than to commit a theft inside? [¶] That's the argument that counsel would have to make in this case assuming [appellant] is connected by way of his presence and other circumstances with the damage that was apparent at the time that the sheriff's department arrived."

B. The courtyard is a "building"

Burglary requires proof of entry into certain structures with the intent to commit larceny or any felony. (*People v. Tafoya* (2007) 42 Cal.4th 147, 170; § 459 ["Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building . . . , with intent to commit grand or petit larceny or any felony is guilty of burglary"].)

Here, there is ample evidence showing that appellant committed burglary. He was practically caught red-handed. He was walking away from the scene as deputies arrived. In front of the deputies, he dropped a pair of dark gloves, a dark shirt, and a hat similar to the witness's description of the man he saw. He had plaster dust on his shoes when he was apprehended. He had burglary tools in his vehicle, which was parked close to the scene, and his crowbar was found near the driveway.

Appellant does not dispute the foregoing evidence. Instead, he argues that the courtyard is not a "building" within the meaning of section 459. We are not convinced.

"It has long been the rule that a 'building' within the meaning of California's burglary statute 'is any structure which has walls on all sides and is covered by a roof.' [Citations.] The walls can take various forms and need not reach the roof [citation], but they must 'act as a significant barrier to entrance without cutting or breaking.' [Citation.] 'The proper question is whether the nature of a structure's composition is such that a reasonable person would expect some protection from unauthorized intrusions.' [Citation.]" (*In re Amber S.* (1995) 33 Cal.App.4th 185, 187; see also *People v. Valencia* (2002) 28 Cal.4th 1, 11, overruled in part on other grounds in *People v. Yarbrough* (2012) 54 Cal.4th 889, 894.)

Here, the courtyard was an integral part or functional part of the building. (*People v. Chavez* (2012) 205 Cal.App.4th 1274, 1282.) The businesses were encompassed by a 15-foot wall, where the only entry was through the eight-foot gates at the front and rear of the compound, which were locked to protect against thieves.[2] The gates acted as the principal access points to the building and as a significant barrier to entrance, as shown by appellant's use of a crowbar to break in that night.

People v. Chavez, supra, 205 Cal.App.4th 1274 is distinguishable. In that case, the court found that an uncovered fenced wrecking yard was not a building or appurtenance of a building within the meaning of section 459, even though there was a

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[2] At appellant's counsel's request during oral argument, we reviewed all of the trial exhibits, including photographs of property and the gates.

building in the yard and one side of the building's wall formed one side of the fenced area. (*People v. Chavez*, *supra*, at p. 1276.) Here, as set forth above, the courtyard and gate were integral parts of the compound.

C. Ample evidence of entry

When a challenge is made to the sufficiency of the evidence, the reviewing court views the evidence in the light most favorable to the judgment. (*People v. Moore* (2011) 51 Cal.4th 386, 408.)

"[A]n entry occurs for purposes of the burglary statute if any part of the intruder's body, or a tool or instrument wielded by the intruder, is 'inside the premises.' [Citations.]" (*People v. Wise* (1994) 25 Cal.App.4th 339, 345.) Even the slightest entry is sufficient. (*Magness v. Superior Court* (2012) 54 Cal.4th 270, 273–274.) In other words, "something that is *outside* must go *inside* for an entry to occur." (*Id*. at p. 279.)

Here, the building owner testified that the locked gate provided access to the four business suites, through the shared courtyard. A metal plate was installed in the stucco doorjamb so that an assailant could not reach the lock. The broken lock was found inside the gate to the compound. The jury could infer from this evidence that some part of appellant's body, or some instrument he was using, entered the compound and resulted in the damaged lock being found inside the gate and courtyard.

II. *The trial court did not abuse its discretion in admitting evidence of two prior burglary offenses*

A. Background

Prior to trial, the prosecutor brought a motion to admit some of appellant's prior burglary convictions[3] on the issue of intent regarding the current burglary charge. Later, the trial court asked the prosecutor about the specifics of the proffered testimony regarding each prior burglary. The prosecutor stated that crowbars were involved in nearly all of the prior burglaries and rugs seemed to be one of the primary targets.

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[3] The prosecutor sought to introduce facts surrounding four of appellant's past offenses.

Defense counsel stated that intent was not an issue in this case; appellant only claimed that he was not the burglar. Therefore, defense counsel argued that the prior acts were inadmissible because intent was not a material element at issue.

The trial court allowed the prosecutor to introduce facts of two admitted priors. It ruled as follows: "In regard to this matter, the Court is aware that the similarity issues certainly rise to a rather distinct level on the issue of I.D. [¶] The jury in this case, if and when the People offer such evidence particularly as to act one and act two, are going to be instructed that they may consider the conduct only on the issue of intent, not on the issue of identity or for any other purpose."

Thereafter, the trial court instructed the jury that the prior burglaries were introduced for the limited purpose of determining appellant's intent. The evidence could not be considered to show appellant's bad character or disposition to commit crimes.

B. Discussion

Evidence Code section 1101, subdivision (a), provides, in relevant part: "[E]vidence of a person's character or a trait of his or her character . . . is inadmissible when offered to prove his or her conduct on a specified occasion." (Evid. Code, § 1101, subd. (a).) But, subdivision (b) permits the admission of evidence that a person committed a crime or other act when it is relevant to prove some fact, such as intent. (Evid. Code, § 1101, subd. (b).) The admissibility of other crimes evidence depends on (1) the materiality of the facts sought to be proved, (2) the tendency of the uncharged crimes to prove those facts, and (3) the existence of any rule or policy requiring the exclusion of the evidence. (*People v. Carpenter* (1997) 15 Cal.4th 312, 378, 379, overruled by statute on other grounds as discussed in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106–1107.) For the tendency of prior acts to prove the disputed facts, only the least degree of similarity is needed to prove intent. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402, superseded by statute on other grounds as discussed in *People v. Britt* (2002) 104 Cal.App.4th 500, 505.)

"A trial court's ruling admitting evidence of other crimes is reviewable for abuse of discretion." (*People v. Hayes* (1990) 52 Cal.3d 577, 617.)

Here, the trial court did not abuse its discretion in admitting evidence of two of appellant's prior acts. The evidence of the prior burglaries was relevant to appellant's intent. He was caught walking away from the scene, and told the police that he was just checking the lock on the gate. Therefore, his intent to commit a burglary was in dispute.

Appellant contends that the presently charged offense was "decidedly dissimilar" from the past offenses. We disagree. Both the prior offenses and the current offenses were commercial burglaries. And, a crowbar was present at all three crimes.

We likewise are not convinced by appellant's claim that evidence of his past burglaries was inadmissible under Evidence Code section 352.[4] As set forth above, the prior burglary evidence was probative to demonstrate appellant's intent. While five law enforcement officers may have testified, that does not mean that their testimony was time-consuming or confusing.

Moreover, we reject any suggestion that the jury did not follow the trial court's instruction regarding consideration of this evidence. (*People v. Delgado* (1993) 5 Cal.4th 312, 331 [we presume that the jury understood and followed the trial court's instruction].)

In any event, even if the trial court had erred in admitting this evidence, the evidence was harmless in light of the other evidence supporting the verdict. (*People v. Earp* (1999) 20 Cal.4th 826, 878.) The evidence against appellant was overwhelming. He was walking away from the scene. He dropped his hat and dark gloves and shirt, all of which were recovered by the deputies. His crowbar was retrieved by the driveway. He had what appeared to be stucco dust on his shoes. And, burglary tools were found in his vehicle, parked near the scene.

Finally, we note that there is no possibility that the admission of this evidence deprived appellant of due process or a fair trial. In general, issues relating to the

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[4] Evidence Code section 352 provides, in relevant part, that a trial court has the discretion to exclude relevant evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

admission of evidence do not rise to the level of a federal constitutional question unless the evidence is "so prejudicial as to render the defendant's trial fundamentally unfair." (*People v. Falsetta* (1999) 21 Cal.4th 903, 913.) As discussed above, the trial court did not err in admitting this evidence. And, even if the trial court did err, the evidence was so overwhelming that any error was harmless beyond a reasonable doubt. Thus, there were no constitutional violations.

III. *The sentence on count II is stayed*

Appellant claims that his punishment on count II, vandalism, should have been stayed pursuant to section 654 because it was part of the same course of conduct and had the same objective as the burglary in count I. The People concede.

We agree. There was no evidence presented that appellant damaged the lock and gate for any reason other than to commit burglary. Since there was no showing that appellant had separate intents or objectives, the trial court improperly imposed a concurrent sentence as to count II. (§ 654; *People v. Britt* (2004) 32 Cal.4th 944, 951–952; *People v. Alford* (2010) 180 Cal.App.4th 1463, 1469.) We correct the sentence to stay the punishment as to count II. The trial court is instructed to amend the abstract of judgment to reflect this modification.

DISPOSITION

The judgment is affirmed as modified. The matter is remanded to the trial court with directions to stay the punishment imposed on count II. The abstract of judgment shall be amended accordingly. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ